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FEDERAL COURTS--THIRD-PARTY "PRACTICE--SOME JURISDICTIONAL PROBLEMS ARISING UNDER THE AMENDED FEDERAL RULES OF CIVIL PROCEDURE, EFFECTIVE MARCH 19, 1948

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FEDERAL COURTS—THIRD-PARTY PRACTICE—SOME JURISDICTIONAL PROBLEMS ARISING UNDER THE AMENDED FEDERAL RULES OF CIVIL PROCEDURE, EFFECTIVE MARCH 19, 1948—Third-party practice as originally adopted by the Federal Rules of Civil Procedure was one of the bolder steps in the direction of integrated and complete litigation of all phases of a transaction.[1] One of the principal problems

[1] Third-party impleader was first introduced into Anglo-American procedure by the Judicature Act of 1873, Rules of Procedure, 36 & 37 Vict., c. 66, Rule 12 (1873). The federal courts adopted it soon thereafter in admiralty proceedings, The Hudson,

that was foreseen by the commentators and that has in fact developed in the cases is the jurisdictional limitation of the federal courts where no federal question is involved, and jurisdiction depends on diversity of citizenship or alienage.[2] Rule 82 is explicit in stating that the Rules should be interpreted so as not to extend or limit the jurisdiction of the district courts. However, it was the hope of the commentators that the federal courts would take jurisdiction of third party claims without requiring a showing of independent grounds of jurisdiction[3] by drawing an analogy to proceedings such as interpleader, cross-claims, counterclaims, intervention, and substitution of parties and by a liberal application of the ancillary concept.[4]

A. *Historical Background of Rule 14(a)*

In its original form Rule 14(a)[5] provided for impleader of a

(D.C. N.Y. 1883) 15 F. 162. The admiralty proceedings are now covered by Admiralty Rule 56, 28 U.S.C.A. (1941) following § 723. In other proceedings, prior to the Federal Rules, third-party practice in the federal courts was governed by the conformity act. It was generally held that only if diversity existed between parties to the third-party claim would jurisdiction be taken. See Prince v. Childs Co., (C.C.A. 2d, 1928) 23 F. (2d) 605; Sperry v. Keller Transportation Line, (D.C. N.Y. 1928) 28 F. (2d) 897. 40 COL. L. REV. 148 (1940) lists six states as having adopted some form of impleader practice by statute or judicial decision. See discussion of state and admiralty practice, 1 MOORE, FEDERAL PRACTICE 749-779 (1938).

[2] Shulman and Jaegerman, "Some Jurisdictional Limitations on Federal Procedure," 45 YALE L.J. 393 at 421 (1936); Clark and Moore, "A New Federal Civil Procedure," 44 YALE L.J. 1291 at 1322 (1935).

[3] See 1 MOORE, FEDERAL PRACTICE 779 (1938).

[4] Many ancillary proceedings without independent jurisdictional grounds may be justified as involving the determination of rights when a res is in the hands of the court. See Penn. Mut. Life Ins. Co. v. Meguire, (D.C. Ky. 1936) 13 F. Supp. 967 (co-citizenship of claimants); Sherman Nat. Bank v. Shubert Theatrical Co., (D.C. N.Y. 1916) 238 F. 225 (co-citizenship of party seeking interpleader and one of claimants.) Likewise, intervention may be so justified, Stewart v. Dunham, 115 U.S. 61, 5 S.Ct. 1163 (1885); Phelps v. Oaks, 117 U.S. 236, 6 S.Ct. 714 (1886); Wichita R. and L. Co. v. Public Utilities Comm. of Kansas, 260 U.S. 48, 43 S.Ct. 51 (1922). Other ancillary proceedings may be justified without jurisdictional grounds because of the regulatory nature of the action, Johnson v. Christian, 125 U.S. 642, 8 S.Ct. 1135 (1888) (proceedings to enjoin enforcement of ejectment obtained in same court); Local Loan Co. v. Hunt, 292 U.S. 234, 54 S.Ct. 695 (1934) (action to regulate statutory bankruptcy proceedings). Presumably third-party claims could come within either of these categories but it is the intention of the writer to limit the scope of the comment to considerations of *in personam* actions devoid of the regulatory element.

[5] Rule 14 (a) as amended, effective March 19, 1948, showing deletions from the original form in parentheses and additions in italic type is as follows: "(a) When Defendant May Bring in Third Party. Before service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him [or to the plaintiff] for all or part of

third-party where the defendant claimed: (1) That the third-party was or might be liable to him in connection with the liability sought to be imposed in the main action or, (2) that the third-party was liable to the plaintiff for all or part of the latter's claim in the main action. The second ground of impleader has been deleted from the present rules. This, according to the Advisory Committee,[6] was done for two basic reasons. First, the weight of authority supported the view that the impleader of such a third-party was in effect a mere tender of a new defendant to the plaintiff, that the latter could not be forced to amend and that a failure to amend dismisses the third-party defendant.[7] Second, the weight of authority was to the effect that if the plaintiff and the third-party defendant were co-citizens, the plaintiff could not amend and assert a claim against the impleaded party.[8] This latter

the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses *to the third-party plaintiff's claim as* provided in Rule 12 and his counterclaims *against the third-party plaintiff* and cross-claims against [the plaintiff, the third-party plaintiff, or any other party] *other third-party defendants* as provided in Rule 13. The third-party defendant may assert *against the plaintiff* any defenses which the third-party plaintiff has to the plaintiff's claim. [The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third-party plaintiff.] *The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.* The plaintiff may [amend his pleadings to] assert *any claim* against the third-party defendant [any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant] *arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13.* A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him [or to the third-party plaintiff] for all or part of the claim made in the action against the third-party defendant." (Italics supplied.)

[6] Report of Advisory Committee on Proposed Amendment to Rules of Civil Procedure for the District Courts of the United States, U.S.C. Cong. Serv., Laws of 79th Cong., 2d sess., p. 2315 at 2327 (1946); 28 U.S. C.A. (Supp. 1948) following § 723. See also Willis, "Proposed Amendment of Rule 14 of the Federal Rules of Civil Procedure," 31 VA. L. REV. 188 (1944).

[7] Crim v. Lumbermen's Mutual Cas. Co., (D.C. D.C. 1939) 26 F. Supp. 715; Satink v. Holland Township, (D.C. N.J. 1940) 31 F. Supp. 229; Delano v. Ives, (D.C. Pa. 1941) 40 F. Supp. 672; Brown v. Cranston, (C.C.A. 2d, 1942) 132 F. (2d) 631; Bates v. Miller, (C.C.A. 2d, 1943) 133 F. (2d) 645.

[8] Hoskie v. Prudential Ins. Co., (D.C. N.Y. 1941) 39 F. Supp. 305; Johnson v. Sherrard Co., (D.C. Mass. 1941) 2 F.R.D. 164, 5 Fed. Rules Serv. 14a511, case 1; Friend v. Middle Atlantic Transportation Co., (C.C.A. 2d, 1946) 153 F. (2d) 778. Contra: Sklar v. Hayes, (D.C. Pa. 1941) 1 F.R.D. 594, 4 Fed. Rules Serv. 14a511, case 2. The latter view was based in the main on the absence of stated jurisdictional grounds in form 22, Motion to Bring in Third-Party Defendant. It is interesting to note that this point was never fully and freely determined by an appellate court, for

view, which is still important to any consideration of jurisdictional limitations of impleader practice, was founded in the main on the general principle expressed in Rule 82.[9] Specifically the courts were worried about the possibility of collusion with a friendly defendant and a resulting circumvention of jurisdictional requirements.[10] In addition, Rules 13 (h) [11] and 19 (b) [12] clearly indicated that the aim of completeness in litigation was limited by jurisdictional requirements when new parties were brought in.[13] Most important, however, the ancillary concept did not seem applicable, since the proceedings by the plaintiff against the third-party defendant, though ancillary in the sense that there was a community of facts involved, was not subordinate but rather, substitutional. Acceptance of the liability of the third-party to the plaintiff would actually make the claim against the third-party the principal action.[14]

Elimination of impleader for liability to the plaintiff has not, however, dispensed with jurisdictional problems. There remain the problems of co-citizenship between parties to the third party claim, that is, the defendant and the third-party defendant. Further, the rules still

by the time it first reached a circuit court of appeals the Advisory Committee's notes had been published. Both appellate courts that did discuss the problem specifically mentioned recommendations for deletions by that body. See Friend v. Middle Atlantic Transportation Co., (C.C.A. 2d, 1946) 153 F. (2d) 778 at 780; B. & O. R. Co. v. Saunders, (C.C.A. 4th, 1947) 159 F. (2d) 481 at 484.

[9] See cases cited note 8, supra. Rule 82 reads: "Jurisdiction and Venue Unaffected. These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein." 28 U.S.C. (1941) following § 723c.

[10] Hoskie v. Prudential Ins. Co., (D.C. N.Y. 1941) 39 F. Supp. 305; Herrington v. Jones, (D.C. La. 1941) 2 F.R.D. 108, 5 Fed. Rules Serv. 14a511, case 2. Johnson v. Sherrard Co., (D.C. Mass. 1941) 2 F.R.D. 164, 5 Fed. Rules Serv. 14a511, case 1. But see suggestion that such danger might be obviated by the wise exercise of discretion, 46 COL. L. REV. 468 at 472 (1946).

[11] Rule 13(h) involves bringing in additional parties, and declares an exception if the court would be deprived of jurisdiction by presence of these parties.

[12] Rule 19(b) is entitled, "Effect of Failure to Join," and states that the court is not required to join parties who are not indispensable if the joinder would deprive the court of jurisdiction.

[13] Herrington v. Jones, (D.C. La. 1941) 2 F.R.D. 108, 5 Fed. Rules Serv. 14a511, case 2; Heyl, "Third-Party Practice in the Federal Courts," INS. L.J. (Jan., 1947) p. 23.

[14] Johnson v. Sherrard Co., (D.C. Mass. 1941) 2 F.R.D. 164, 5 Fed. Rules Serv. 14a511, case 1; Rutherford v. Pa. Greyhound Lines, (D.C. Ohio 1945) 7 F.R.D. 245. Some of the earlier cases seemed to make a distinction between those cases where the third-party was claimed to be solely liable to the plaintiff and where claimed to be only jointly liable to the plaintiff. See cases cited 148 A.L.R. 1195 (1944). But the later cases have disregarded this distinction. Friend v. Middle Atlantic Transportation Co., (C.C.A. 2d, 1946) 153 F. (2d) 778; B. & O. R. Co. v. Saunders, (C.C.A. 4th, 1947) 159 F. (2d) 481; Weaver v. Marcus, (C.C.A. 4th, 1948) 165 F. (2d) 862.

allow the plaintiff to assert a claim arising out of the central transaction against the impleaded party, and the third-party defendant to assert a similar claim against the plaintiff whether or not the latter has asserted a claim directly against him. Thus the rules are still broad enough to allow courts to hear and determine claims between co-citizens without a federal question being involved.

B. *When All Parties Are from Different States*

The simplest cases, of course, involve three parties from three different states where the requisite diversity between the parties is obviously present. Thus in a suit involving plaintiff *P* from state 1, defendant *D* from state 2, and third-party defendant *T* from state 3, there is always the requisite diversity in the controversy between the parties *P* 1 and *D* 2 and in that between *D* 2 and *T* 3. The problem is not complicated by *P* 1's assertion of a claim against *T* 3, as provided for in the rule, nor for that matter by any counterclaim between the various parties to the entire controversy, because diversity can always be found. However, such situations rarely arise, because the mine-run case will probably involve co-citizenship between at least two of the parties[15] and because of the territorial limitations of process.[16] Unless the third party is a corporation doing business within the state or a person subject to some other form of substituted process,[17] the court has difficulty getting personal jurisdiction of the third-party defendant.[18]

[15] The majority of the tort cases seem to involve an action by an automobile guest against a non-citizen with the impleader of the driver-host seeking contribution. The probability of co-citizenship is clear. See, for example, Malkin v. Arundel Corp., (D.C. Md. 1941) 36 F. Supp. 948. Many of the contract cases sound in breach of warranty with the defendant impleading his own warrantor. The possibility of co-citizenship is again clear. See Metzger v. Breeze Corp., (D.C. N.J. 1941) 37 F. Supp. 693.

[16] F. & M. Skirt Co. v. A. Wimpfheimer & Bro., (D.C. Mass. 1939) 27 F. Supp. 239; Thompson v. Temple Cotton Oil Co., (D.C. Ark. 1942) 2 F.R.D. 373. See suggestion that statutory provision be made for the extension of third-party process. J. D. Poteat, address delivered at Conference of Fourth Judicial Circuit, Asheville, N.C., reported in 25 A.B.A.J. 858 (1939).

[17] Process through non-resident motorists statutes has been successfully employed, Sussan v. Strasser, (D.C. Pa. 1941) 36 F. Supp. 266; Malkin v. Arundel Corp., (D.C. Md. 1941) 36 F. Supp 948.

[18] Another factor running through all impleader proceedings is the matter of venue. The courts seem to have gone in all directions on this problem. On the face of it, it would seem that Rule 82 specifically applies with equal force to venue as well as jurisdiction. Some courts have recognized the privilege of venue, King v. Shepherd, (D.C. Ark. 1938) 26 F. Supp. 357; Lewis v. United Air Lines Transport Corp., (D.C. Conn. 1939) 29 F. Supp. 112. Other courts have accepted the idea that third-party proceedings are ancillary for all purposes and rule accordingly that the venue of the action is governed by that of the original action. Morrell v. United Air Lines Corp.,

C. When Original Plaintiff and Third-Party Defendant Are Co-Citizens

1. *Controversy between defendant and third-party defendant.* The first real problem arises where there is co-citizenship between the original plaintiff and the third-party defendant. Using the symbols set out above, this action could be denominated *P* 1 v. *D* 2 v. *T* 1. From a jurisdictional standpoint, absent further claims by the parties, there seems little objection to this type of action. Again there is in each controversy involved the proper diversity. The central action, *P* 1 v. *D* 2, and the ancillary indemnity action, *D* 2 v. *T* 1, each have individually satisfied diversity requirements. The fact that *P* 1 and *T* 1 are co-citizens is immaterial since any judgment granted would run only between citizens of different states. From the first the federal courts have found little difficulty in accepting jurisdiction under such circumstances.[19]

2. *Amendment by plaintiff to assert claim against third-party defendant.* The situation is complicated when, after the proper impleader of *T* 1, *P* 1 asserts a claim arising out of the main transaction against *T* 1. As indicated above, prior to the amendment of the rules, the third-party defendant's presence in the case was dependent upon a showing of diversity between him and the plaintiff. However, in our present hypothetical, bringing in the third party is a matter of right to the original defendant, *T* 1 is properly in the case and will stay in the case. *P* 1 thus asserts his claim against a party who is in the action at the request of other litigants. The new claim, since it arises out of the main transaction, clearly has the flavor of a *compulsory* counterclaim for which, the cases indicate, independent grounds of jurisdiction are not necessary.[20]

This latter situation is roughly analogous to a case where two

(D.C. N.Y. 1939) 29 F. Supp. 757; Gray v. Hartford Indemnity Co., (D.C. La. 1940) 31 F. Supp. 299; Gerber v. Fruchter, (C.C.A. 2d, 1945) 147 F. (2d) 120; Moncrief v. Pennsylvania R. Co., (D.C. Pa. 1947) 73 F. Supp. 815. The weight of authority is probably with the latter view. Judge Clark, speaking in Lesnik v. Public Industrials Corp., (C.C.A. 2d, 1944) 144 F. (2d) 968 at 976, suggests that there are "degrees of ancillarity" and that the privilege of venue is available only when the ancillary proceeding is distinctly separate from the main controversy. For criticism of the light handling given the venue question by the federal courts see Ohlinger, "Jurisdiction, Venue and Process as to Counterclaims and Third-Party Claims," 6 FED. B.J. 420 (1945).

[19] Crum v. Appalachian Electric Power Co., (D.C. W. Va. 1939) 29 F. Supp. 90; Sussan v. Strasser, (D.C. Pa. 1941) 36 F. Supp. 266; Williams v. Keyes, (C.C.A. 5th, 1942) 125 F. (2d) 208; Bernstein v. N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij, (D.C. N.Y. 1946) 6 F.R.D. 297; Hedrick v. Santa Fe Trail Transportation Co., (D.C. Mo. 1947) 74 F. Supp. 805.

[20] Moore v. New York Cotton Exchange, 270 U.S. 593, 46 S.Ct. 367 (1926); United States v. American Surety Co., (D.C. N.Y. 1938) 25 F. Supp. 700; McCarthy v. M & M Transportation Co., (D.C. Mass. 1946) 5 F.R.D. 290.

parties are in court on a federal question and a second count or counterclaim arising out of the same transaction is allowed to go to judgment even though the main action fails. The Supreme Court has upheld jurisdiction in such cases on the general concept that once the parties are properly before the court on one cause of action, the court can completely determine all phases of that controversy between those same parties.[21] However, our present case differs slightly, for though *P* 1 and *T* 1 are properly before the court as parties, they have not been properly before the court as adversaries. A new alignment of parties and a new claim are thus presented to the court. The propriety of the litigation of this controversy without independent jurisdictional grounds will depend upon its ancillarity. There is a good deal of force in the concept that a second count or a counterclaim between two parties already before the court on one claim is ancillary in that it is subordinate and that it arises out of the central claim. But here the plaintiff seeks new redress against a party with whom he was not formerly concerned. The new claim thus seems more nearly substitutional in nature.[22]

Not being adversaries, the position of *P* 1 and and *T* 1 is in a sense similar to that of co-parties between whom a cross-claim has arisen.[23] Such claims, the courts have held, if arising out of the same transaction as the central claim or counterclaim, need not have independent jurisdictional grounds.[24] Again, however, the justification is based on the ancillary concept and the presence of a subordinate dependent claim, something probably not present here in view of the substitutional nature of the new claim.

The new claim by *P* 1 may, on the other hand, be analogized to a counterclaim bringing in a third-party necessary to the determination of such claim. As far as *P* 1's claim against *D* 2 is concerned *T* 1 is a new party. Rule 13 (h)[25] provides that "parties other than those to the original action" may be brought in on a counterclaim only in those situations where the court will not be deprived of its jurisdiction.[26]

[21] Hurn v. Oursler, 289 U.S. 238, 53 S.Ct. 586 (1933); Moore v. New York Cotton Exchange, 270 U.S. 593, 46 S.Ct. 367 (1926).

[22] See note 14, supra.

[23] See Rule 13(g).

[24] Kelleam v. Maryland Cas. Co., 312 U.S. 377, 61 S.Ct. 595 (1941); Carter Oil Co. v. Wood, (D.C. Ill. 1940) 30 F. Supp. 875; 1 MOORE, FEDERAL PRACTICE 726 (1938); 3 OHLINGER, FEDERAL PRACTICE 253 (1948).

[25] See note 11, supra.

[26] There is a question whether a counterclaim bringing in a third-party who is a co-citizen of the counterclaimant will deprive the court of its jurisdiction. A simple reading of Rule 13 (h) (see note 11, supra) seems to indicate that independent jurisdictional grounds are necessary. Professor Moore indicates the same result, 1 MOORE, FEDERAL PRACTICE 731, note 6 (1938), and certain of the cases seem to assume the necessity for such grounds, Federal Gas, Oil & Coal Co. v. Cassady, (D.C. Ky. 1943) 56 F. Supp. 824; Galbraith v. Bond Stores, (D.C. Mo. 1945) 4 F.R.D.

Certainly if a counterclaim is thus limited by the diversity requirement, it would seem proper likewise to limit an amended claim by the plaintiff against a "new" party. Further, if a counterclaim against two parties one of whom is a new party requires separate jurisdictional grounds, *a fortiori*, a claim solely against a "new" party would require such grounds.

Under Rule 14 prior to amendment only a few cases presented a comparable problem. But those cases indicated that where the third party was brought in both on grounds of indemnity and liability over to the plaintiff, the original plaintiff's motion to amend would be denied in the absence of diversity between himself and the third-party defendant, though the latter would be retained in the case as an indemnifier.[27] Most of the cases holding that independent grounds of jurisdiction were necessary arose where the impleader was based solely on alleged liability over to the plaintiff, there being no independent grounds for holding the third party in the case as the plaintiff did not or could not amend. However, it is felt that the more recent cases denying the availability of amendment are put in such strong terms that it is doubtful that the courts would allow *P* 1 in our present hypothetical to assert a claim against *T* 1.[28]

3. *Counterclaim of third-party defendant against plaintiff.* The same general considerations apply if, on our hypothetical, *P* 1 v. *D* 2 v. *T* 1, the third-party defendant, *T* 1, asserts a counterclaim against his co-citizen the plaintiff, but under the rule as it now stands, *T* 1 may assert such a claim arising out of the main transaction before or without an assertion of a claim against him by *P* 1.[29]

319. Yet there is authority that no such grounds are necessary. Carter Oil Co. v. Wood, (D.C. Ill. 1940) 30 F. Supp. 875; Arizona Lead Mines, Inc. v. Sullivan Mining Co., (D.C. Idaho 1943) 3 F.R.D. 135, 7 Fed. Rules Serv. 13h21, case 1; United States v. Skilken, (D.C. Ohio 1943) 53 F. Supp. 14. The first two cases are distinguishable since both involve title to property, but the Skilken case seems to support the latter view. The underlying reason given is that such an action is ancillary and that the otherwise clear words of Rule 13 (h) should give way to the ancillary exception.

[27] Hoskie v. Prudential Ins. Co., (D.C. N.Y. 1941) 39 F. Supp. 305; Sussan v. Strasser, (D.C. Pa. 1941) 36 F. Supp. 266. Cf. McDonald v. Dykes, (D.C. Pa. 1947) 6 F.R.D. 569, where defendant impleaded a third-party solely on the grounds of joint liability to the plaintiff, though a claim of indemnity was available. A verdict for the plaintiff against the third-party defendant was set aside.

[28] Friend v. Middle Atlantic Transportation Co., (C.C.A. 2d, 1946) 153 F. (2d) 778; B. & O. R. Co. v. Saunders, (C.C.A. 4th, 1947) 159 F. (2d) 481; Hull v. U.S. Rubber Co., (D.C. Mich. 1945) 7 F.R.D. 243; Reese v. Akers Motor Lines, (D.C. Ga. 1947) 7 F.R.D. 682.

[29] Prior to the amendment of the rules there existed a conflict as to whether a third-party defendant might counterclaim against the plaintiff in the absence of plaintiff's amendment to state a claim against the impleaded party. See Atlantic Coast Line R. Co. v. U.S.F. & G. Co., (D.C. Ga. 1943) 52 F. Supp. 177; Morris, Wheeler & Co. v. Rust Engineering Corp., (D.C. Del. 1945) 4 F.R.D. 307.

Those cases allowing a counterclaim without separate jurisdictional requirements seem to support such action,[30] but once more may be differentiated by demonstrating that in our hypothetical situation there is a counterclaim between parties who have not, prior to the interjection of the counterclaim, been properly before the court as adversaries. Again the analogy to cross-claimants may be mentioned and justification found in the ancillary concept. Concerning that concept it seems more probable that such a claim would not be a substitute for the main cause, that it would be subordinate to the main claim.[31] However, it would seem questionable from the point of view of rough justice to allow such a counterclaim if the plaintiff is not, as pointed out under the prior discussion, permitted to assert an affirmative claim against the third-party defendant.

If, however, we assume that the amendment by *P* 1 would be allowed and such amendment is made, then the usual rules as to counterclaims and the necessity of separate jurisdictional grounds would apply. Thus if the counterclaim were compulsory, no independent grounds would be necessary;[32] if permissive only, generally the opposite would be true.[33]

D. *Where Defendant and Third-Party Are Co-Citizens*

1. *Controversy between defendant and third-party.* The second large class of cases involves the co-citizenship of the parties to the third-party claim. Applying the symbols heretofore employed this may be represented by the action *P* 1 v. *D* 2 v. *T* 2. The third party claim

[30] Moore v. New York Cotton Exchange, 270 U.S. 593, 46 S.Ct. 367 (1926); General Electric Co. v. Fansteel Products Corp., (D.C. N.Y. 1931) 5 F. Supp. 828; Kaumagraph Co. v. General Trade Mark Corp., (D.C. N.Y. 1935) 12 F. Supp. 230.

[31] But see remarks of Judge Minton in People v. Maryland Gas. Co., (C.C.A. 7th, 1942) 132 F. (2d) 850 at 854: "When the third party defendants abandoned their role as third party defendants and assumed, without objection, their role as full-fledged defendants . . . , they destroyed diversity of citizenship and hence the jurisdiction of the District Court." In Morris, Wheeler & Co. v. Rust Engineering Corp., (D.C. Del. 1945) 4 F.R.D. 307, the court indicated that the same reasoning which operates to deny the plaintiff the right to assert a claim against the third-party defendant applied to a counterclaim asserted by the latter against the former.

[32] United States v. American Surety Co., (D.C. N.Y. 1938) 25 F. Supp. 700; Dewey & Almy Chemical Co. v. Johnson, Drake & Piper, (D.C. N.Y. 1939) 25 F. Supp. 1021; 17 HUGHES, FEDERAL PRACTICE, § 20572 (1940); 1 MOORE, FEDERAL PRACTICE 686 (1938); 3 OHLINGER, FEDERAL PRACTICE 246 (1948).

[33] Cleveland Engineering Co. v. Galion Dynamic Motor Truck Co., (D.C. Ohio 1917) 243 F. 405; Barber Asphalt Corp. v. La Fera Grecco Co., (C.C.A. 3d, 1940) 116 F. (2d) 211; Hartford-Empire Co. v. Glenshaw Glass Co., (D.C. Pa. 1942) 47 F. Supp. 711; 17 HUGHES, FEDERAL PRACTICE, § 20592 (1940); 1 MOORE, FEDERAL PRACTICE 696 (1938); 3 OHLINGER, FEDERAL PRACTICE 249 (1948). Moore and Ohlinger cite as an exception to this rule the case where the counterclaim is in the nature of a set-off. See Marks v. Spitz, (D.C. Mass. 1945) 4 F.R.D. 348.

under the present rules would be founded on a claim of indemnity or contribution by *D* 2 against *T* 2, for the liability sought to be imposed in the action *P* 1 v. *D* 2. Since the impleader of *T* 2 is founded on a claimed liability dependent upon the result of the main action the subordinate nature of the new proceedings is clear. Assuming in addition the proper identity of facts the ancillary concept seems to be satisfied. Here, though the judgment rendered as between *D* 2 and *T* 2 would run between co-citizens, such judgment would not take the place of the main judgment but would be merely in addition to it.

It may be further pointed out that in such a case the argument of convenience is perhaps stronger since assuming liability is imposed in the primary action, a second action would likely follow in the absence of the impleader proceeding. At the same time there is no element of circumvention of jurisdictional requirements by the plaintiff, since the latter, if he was able to assert a claim against the third party, could have joined him originally.[34]

Suffice it to say that the courts seem to have found little trouble in such situations in finding the third-party claim an ancillary one, free of independent jurisdiction requirements.[35]

2. *Counterclaim of third-party defendant against third-party plaintiff.* Again what seems to be a fairly simple situation is complicated by the interpolation of a counterclaim by the third-party defendant, *T* 2 against the third-party plaintiff, *D* 2. Rule 14 itself allows *T* 2 to make "his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13." Referring to that rule and its interpretation we find that if such claim does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim, that is, if it is permissive in nature, independent grounds of jurisdiction are necessary.[36]

On the other hand, if *T* 2's counterclaim against *D* 2 arises out of the transaction or occurrence involved in the third-party complaint, if it is a compulsory counterclaim, the opposite result would be reached. This may be rationally justified on the following grounds: first, if the indemnity or contribution claim of *D* 2 against *T* 2 were properly in court on a federal question, a counterclaim of this sort would be proper. Since *D* 2 and *T* 2 are properly before the court as adversaries in an

[34] Willis, "Five Years of Federal Third-Party Practice," 29 VA. L. REV. 981 (1943).

[35] Tullgren v. Jasper, (D.C. Md., 1939) 27 F. Supp. 413; Schramm v. Roney, (D.C. Mich. 1939) 30 F. Supp. 458; United States v. Pryor, (D.C. Ill. 1940) 2 F.R.D. 382; Saba v. Emil Katz & Co., (D.C. N.Y. 1944) 55 F. Supp. 1000; Pyzynski v. N.Y.C. R. Co., (D.C. N.Y. 1946) 7 F.R.D. 302.

[36] Note 33, supra.

ancillary proceeding, the counterclaim is again in order. Secondly, since the counterclaim arises from the subject matter of the opposing party's claim, which in turn must be ancillary to the main claim, it follows that the counterclaim is likewise ancillary to the main claim.

D. *Conclusion*

In conclusion it may again be emphasized that the jurisdictional problems raised by third-party procedures have by no means been eliminated by the amended rules. Indeed it seems clear that the amendments were not directed toward the elimination of all such problems. There remain these problems arising (1) where the plaintiff amends to state a claim against the impleaded party, (2) where the third-party defendant counterclaims against the plaintiff, and (3) where the third-party defendant counterclaims against the third-party plaintiff. It is unusual that a problem that has caused so much comment among writers and has supplied quite a fund of decisions in the district courts has not received fuller treatment on the appellate level. The conveniences of third-party practice are so obvious that it is to be hoped that the jurisdictional intricacies of impleader will be soon worked out.

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